

Ingram Barge Company and Pilots Agree Association, of the Great Lakes and Rivers Maritime Region Membership Group of the International Organization of Masters, Mates and Pilots, ILA, AFL-CIO. Case 26-CA-18649

December 14, 2001

DECISION AND ORDER

**BY CHAIRMAN HURTGEN AND MEMBERS
LIEBMAN
AND WALSH**

On October 14, 1999, Administrative Law Judge Pargen Robertson issued the attached decision. The General Counsel, the Respondent, and the Charging Party filed exceptions and supporting briefs. In addition, the General Counsel, the Respondent, and the Charging Party filed answering briefs. Finally, the Respondent filed reply briefs.

On June 29, 2001, the National Labor Relations Board issued a Notice and Invitation to File Briefs, which invited the parties to file supplemental briefs on the impact of the Supreme Court's decision in *NLRB v. Kentucky River Community Care*, 121 S.Ct. 1861 (2001), on the decision in this case. The General Counsel, the Respondent, and the Charging Party filed supplemental briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings and conclusions¹ and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, and the complaint is dismissed.

Rosalind Thomas, Esq., for the General Counsel.

Ernest R. Malone Jr., Esq., of New Orleans, Louisiana, for the Respondent.

Samuel Morris, Esq. and *Florence Johnson, Esq.*, of Memphis, Tennessee, for the Charging Party.

¹ In his decision, the judge recommended that the 8(a)(1) and (3) complaint be dismissed in its entirety because he found that the Respondent's barge pilots were not statutory employees, but were supervisors within the meaning of Sec. 2(11) of the Act. In so finding, the judge specifically determined that "the pilots' supervisory duties remain essentially as they were in 1962 when the Board decided [in] an earlier *Ingram Barge* case" that the Respondent's pilots were supervisors. See *Masters, Mates & Pilots Local 28 (Ingram Barge Co.)*, 136 NLRB 1175, 1203 (1962) (*Ingram Barge I*), enf. 321 F.2d 376 (D.C. Cir. 1963). In the absence of three votes to overrule *Ingram Barge I*, Members Liebman and Walsh agree with Chairman Hurtgen that the judge correctly applied that precedent here in recommending that the complaint be dismissed.

DECISION

STATEMENT OF CASE

PARGEN ROBERTSON, Administrative Law Judge. This hearing was held in Memphis, Tennessee, on June 21 and 22, 1999. The charge was filed on May 11 and amended on June 12, 1998. The complaint issued on November 24, 1998. In consideration of the full record including briefs filed by Respondent, Charging Party, and General Counsel, I make the following findings.

I. JURISDICTION

Respondent admitted that at material times it has been a corporation with a place of business in Nashville, Tennessee, where it has been engaged in the business of providing towboat and barge inland waterway transportation services; during the 12-month period ending October 31, 1998, it purchased and received at its Nashville facility goods and materials valued in excess of \$50,000 from points outside Tennessee, it derived gross revenues in excess of \$50,000 from the transportation of freight in interstate commerce under arrangements with and as agent for various common carriers each of which operates between various States of the United States, it performed services valued in excess of \$50,000 in States other than Tennessee and based on those business operations it functioned as an essential link in the transportation of freight in interstate commerce. Respondent admitted that it has been an employer engaged in commerce at material times.

II. LABOR ORGANIZATION

Respondent denied that Charging Party (Pilots Agree) has been a labor organization at material times. The evidence revealed that the Charging Party engaged in the functions normally exercised by a labor organization.¹ The outstanding disputed issue involved whether Charging Party acted as a labor organization for employees. As shown below, Respondent contended that the captains and pilots involved in the organization and activities of the Charging Party were supervisors. However, Pilots Agree wrote Respondent on March 27, 1998, stating that it wished to discuss working conditions of "personnel working aboard your towboats." Obviously, some of the personnel working aboard Respondent's towboats were employees.² Despite Respondent's argument to the contrary, the inclusion of supervisors does not justify a determination that Pilots Agree is not a labor organization. I find Pilots Agree was a labor organization at material times.

¹ As noted throughout this decision, the evidence proved that various captains and pilots working for Respondent engaged in efforts to organize captains and pilots for the Charging Party. Pilots Agree wrote Respondent on March 27, 1998, seeking discussions regarding safety, working conditions, living conditions, benefits and wages for personnel working aboard Respondent's towboats. Pilots Agree wrote again on April 20 and asked to be recognized by Respondent.

² Cf. *Masters, Mates & Pilots Local 28 (Ingram Barge Co.)*, 136 NLRB 1175 (1962), enf. 321 F.2d 376 (D.C. Cir. 1963), where the union was found to represent only supervisors.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The allegations include violations of Section 8(a)(1) and (3). The initial outstanding disputed issue involves the status of pilots. Respondent contends and General Counsel disputes that those people are supervisors.

Steve Crowley is Respondent's assistant vice president of operations. At the times material to this proceeding he was its marine superintendent. Crowley testified that Respondent handles its crewing, warehousing and hiring from its facility in Paducah, Kentucky. Employees including pilots work from Paducah.

Respondent operated 58 towboats. Each towboat routinely pushed a number of barges up and down rivers including the Mississippi, Ohio, and Tennessee. Testimony showed that a tow may include 25 or more barges and may be 1/4-mile long. A crew that includes the wheelhouse officers, a cook,³ a deck crew⁴ and one or two engineers⁵ man each vessel.⁶ The wheelhouse officers include the captain and a pilot. Both those employees are licensed⁷ and they are the only employees that work in the wheelhouse. In April 1998, Respondent employed approximately 115 captains and approximately 110 pilots.

The crew of each vessel normally works a 30-day on, 30-day off schedule.⁸ While on the vessel, the captain and pilot work alternate shifts. The captain works the front shift including hours from 0600 to 1200 and from 1800 to 0001. The pilot is on at all other times and his is the backshift. The captain is the highest ranking employee and the ultimate supervisor⁹ on board. All crewmembers ultimately report to the captain. He is responsible for the overall administration as well as the operation of the vessel including its navigation.

The pilot¹⁰ reports directly to the captain.¹¹ During the captain's watch the captain mans the wheelhouse. During the pi-

lot's watch, the captain is off duty and the pilot mans the wheelhouse. Harley Hall, David Sullivan, Rodger Sholar, Lavon Church, and Tony Gurley testified that pilots do not have authority to hire, fire, transfer, suspend, layoff, recall, promote, discharge, or assign overtime to employees nor do they have authority to adjust employee grievances. Hall knew of no instance of a pilot exercising any of those actions. However, Hall testified that on occasions, recently hired pilots have attempted to exercise authority over other crewmembers. On those occasions, Hall acted to stop such activity by the pilot. Hall testified that the mate is the supervisor during the back watch¹² and the pilot's responsibilities are limited to driving the boat.¹³ Harley Hall admitted on cross-examination that a pilot might post a lookout when conditions justify such action. Pilots may direct work of deckhands that affect the safety or navigation of the towboat and barges. For example a pilot may tell someone that a line should be tightened. However, the pilot does not assign a specific deckhand to a project. The mate makes assignments.

Former senior mate Robert Ward testified that the pilot did not direct his work. He worked with Captain Harley Hall and Pilot Ron Church. Ward was told that Harley Hall was his supervisor. During the pilot's watch, Ward made the work assignments to deck personnel. Robert Ward like Harley Hall before him, testified that pilots have not exercised authority to hire, fire, transfer, suspend, layoff, recall, promote, discharge, or assign overtime to employees nor do they have authority to adjust employee grievances. Pilots have not made work assignments nor have pilots granted anyone authority to leave a vessel. On advice from the pilot, Ward has occasionally worked on equipment on board including running lights and depth sounders. However, the pilot did not decide which employee performed those functions. The mate (Ward in those cases) made that decision. Ward testified that pilots are paid more than mates are.¹⁴ Respondent called second mate Kenneth Pine. Pine worked on the vessel with Ron Church. He testified that he was instructed that he was required to follow Church's orders and that Church did give specific orders to him while Church was on watch.

³ The cook reports to the captain.

⁴ Crowley testified that the size of the crew would range from four to six depending on the size of the vessel. The direct immediate supervisor of the deck crew is the mate. The mate reports to the captain. Respondent also offered evidence that two-man crews operate some of its vessels. Those crews would not include a pilot.

⁵ Each vessel has a chief engineer. Some vessels have a second engineer (i.e., an assistant or a junior engineer) in addition to the chief. The chief engineer reports directly to the captain.

⁶ The term vessel, as used herein, oftentimes refers to the powered towboat that houses the crew but on occasion it also refers to the boat and its load of barges that constitute the entire operation.

⁷ Former pilot David Sullivan testified that he has an operator's license, which permits him to hold the jobs of captain and pilot.

⁸ Respondent called David Varvel. Varvel testified that the current schedule is 28-days on, 28-days off.

⁹ The evidence is not in dispute as to the supervisory status of the captain, the mate and on occasion, the chief engineer. The mate is the immediate supervisor of the deck employees. When there is an assistant engineer on board, the chief engineer is that employee's immediate supervisor. As shown herein there was disputed evidence that the pilot is supervisor over both the mate and the chief engineer during the pilot's watch.

¹⁰ Respondent uses trip pilots on occasion. Trip pilots are not full-time employees. Instead trip pilots hold a license and work for various companies as part-timers. Trip pilots are not included in company meetings and are not privy to confidential information.

¹¹ There was disagreement as to the chain of command aboard each vessel. General Counsel offered evidence that the supervisors include the captain, the mate and the chief engineer. Respondent offered evidence that the chain of command involved the captain, the pilot and the engineer (Tr. 241). Respondent witness David Varvel agreed that the mate is a supervisor but testified that the mate answers to both the captain and the pilot depending on which one is on watch.

¹² The pilot is on duty during the back watch.

¹³ Respondent called Captain David Varvel. Varvel testified that the pilot maintains a log of events that occur on his watch. On his vessel the pilot is responsible for sending a copy of the log to Respondent's office when he goes off his watch. Varvel testified that the pilot makes specific work assignments during his watch to all the deckhands including the mate. Varvel has instructed his mate that the pilot is the mate's supervisor.

¹⁴ Alleged discriminatee and former pilot Tony Gurley testified that a captain's salary was about \$56,000, a pilot's salary was about \$53,000, and a mate's salary was about \$25,000 per year (Tr. 194).

Captain David Varvel¹⁵ testified that a vessel both drops off and takes on barges as it moves up or down the river. Varvel testified that the pilot is responsible for taking on and dropping off barges during the pilot's watch and the pilot is responsible to rearrange the load in order to maintain an efficient and safe operation. Varvel testified that the pilot handles disputes and grievances among the crew during the pilot's watch. If the grievance is a minor one, the pilot may handle it himself or it may be necessary to wake the captain.

Those employees involved in these proceedings that were pilots include Lavon Church,¹⁶ Tony Gurley,¹⁷ Rodger Sholar,¹⁸ and David Sullivan.¹⁹

Findings

Credibility

I was impressed with David Varvel and Kenneth Pine's testimony and demeanor. I was not impressed with the demeanor and testimony of Jeff Cavitt. Cavitt appeared to be evasive and interested in being as uncooperative as he could on cross-examination.

I do not credit Jeff Cavitt's testimony that a pilot may put someone off the vessel for intoxication or fighting. Cavitt admitted that he has never witnessed that happening. Despite the testimony of Kenneth Pine, I am convinced that pilots do not discipline crewmembers to the extent of any action, which is reflected in the employees personnel file. The full record failed to reveal any instance where that has actually occurred.

As to the credibility of the different versions of the pilots' authority, I have considered a number of factors in addition to demeanor. As shown herein there was testimony regarding the nature of the job and the impact of numerous factors contributing to a higher level of difficulty in handling a vessel towing a large number of heavily loaded barges. That evidence was considered in determining which version of the pilots' duties was the most likely to be credible. Additionally, I noticed that several witnesses including David Sullivan, Rodger Sholar, Tony Gurley, Lavon Church, Harley Hall Jr., and Steve Crowley testified about masters' meetings, which were also referred to as management or officers meetings. Rodger Sholar testified that those were annual meetings and he attended two of those meetings during the time he worked for Respondent. Respondent holds several of those meetings each year in order to include all the captains and pilots without disrupting operation of its vessels. It was at the 1998 meetings that Orrin Ingram allegedly made threats that violated Section 8(a)(1). However, as to my credibility findings on this one issue, those meetings represented something else. Captains and pilots were included in those meetings and they were advised that confidential matters

would be discussed. No other vessel employees were included. Even "trip pilots" were not included in the meetings. Those meetings were not a recent fabrication created to combat Pilot's Agree. That evidence tends to show that Respondent has consistently treated pilots as part of management. Moreover, an earlier decision established a basis for Respondent's belief that pilots were supervisors. In *Masters, Mates & Pilots Local 28 (Ingram Barge Co.)*, 136 NLRB 1175 (1962), enf'd. 321 F.2d 376 (D.C. Cir. 1963), the Board upheld the finding that Respondent's pilots were supervisors. I have considered that evidence in making these credibility determinations.

With those factors, the full record, and the demeanor of the witnesses in mind, I am convinced that David Varvel's testimony regarding pilots' job and duties especially the testimony regarding whether pilots direct the work of deck employees, is the most credible of all the witnesses. I shall credit his testimony and to the extent other testimony conflicts I shall discredit that testimony and credit the testimony of Varvel.

Conclusions

The Act extends certain rights and protection to employees engaged in protected activity. Employee is defined in Section 2(3) of the Act and that section specifically excludes from the term employee "any individual employed as a supervisor." Supervisor is defined in Section 2(11):

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Eleventh Circuit recently considered the question of supervisory status of pilots in *Copper/T Smith, Inc. v. NLRB*, 177 F.3d 1259 (11th Cir. 1999). There the court stated:

The statutory definition lists the functions of a supervisor in the disjunctive, so Cooper only needs to prove that docking pilots fulfill one of these functions in order to succeed in its claim that pilots are supervisors. See *N.L.R.B. v. Dadco Fashions, Inc.*, 632 F. 2d 493, 496 (5th Cir. Unit A 1980). As the Supreme Court has noted, three questions must be answered in the affirmative for an employee to be deemed a supervisor under section 2(11): "First, does the employee have authority to engage in 1 of the 12 listed activities? Second, does the exercise of that authority require 'the use of independent judgment'? Third, does the employee hold the authority in the 'interest of the employer?'"

The evidence here proved that pilots as well as captains, lack authority to hire, transfer, suspend, lay off, recall, promote, reward, or discipline other employees. The pilots lack the authority to effectively recommend²⁰ any of those actions. Unlike

¹⁵ David Varvel oftentimes used the term "master." From his testimony it appeared that term is interchangeable with "captain."

¹⁶ Church was assigned to the vessel *John M. Donnelly* and the captains were Harley Hall and David Graham.

¹⁷ Gurley was assigned to the vessel *O. H. Ingram* and the captains were Darrell Hardy and Tom Hayley Jr.

¹⁸ Sholar was assigned to the vessel *Ilene Bigelow* and one of the captains was Billie Martin.

¹⁹ Sullivan was assigned to the vessel *Alice I. Hooker* one of the captains was Rich Gilley.

²⁰ There was evidence that Lavon Church prepared a performance evaluation on Robert Ward (R. Exh. 8). However, the record proved

the pilots, the record shows that the captains have the authority to effectively recommend those actions.

I am convinced that pilots neither have nor have exercised the authority to discharge employees. The full record proved that no one on board vessels including the captain has the authority to discharge. In extreme cases such as obvious intoxication the captain could put an offending employee off the vessel and recommend discharge. As shown above, I discredit the testimony of Jeff Cavitt that a pilot may put someone off the vessel for fighting or intoxication.

As shown above, I do not credit testimony showing that pilots may adjust grievances nor may a pilot effectively recommend any actions.

Their remains an issue regarding two of the Section 2(11) supervisory indicia. Those are the direction of work and the assignment of jobs to deck employees. The Board has held that the possession of any one of the indicia specified in Section 2(11) is sufficient to confer supervisory status on an individual if the statutory authority is exercised with independent judgment and not in a routine manner (*Spentonbush/Red Star Cos.*, 319 NLRB 988 (1995)).

There was no dispute but that the pilots are charged with the operation of the boats and barges for 12 hours each day while the captain is off watch. In that respect the pilot is responsible for the efficient and safe operation of the vessel. The credited testimony of David Varvel showed that the pilot communicates with the office during his watch. Those communications may involve orders from the office "for barges, orders for crew changes, orders for just, you know, anything that goes on with the vessel." The pilot has administrative duties involved with maintaining the log. Log entries involve "the stuff that he does while he's on watch" and he figures the mileage, the fuel and the lube oil. He makes copies of the log and sends a copy out in the mornings. The pilot is responsible for the safety of the vessel and crew and he directs the deck crew in the work of "what barges we're going to pick up and where they're going to be placed in tow, and how they need to, on occasion, wire them in tow." The pilot, as well as the captain when he is on duty, is required to remain in the pilothouse where he has the highest view of the vessel and the river. The watch-standing officer uses binoculars in keeping watch over the entire load of barges and the vessel plus the surrounding area. Other crewmembers including the mate are assigned at various places on the boat or barges. The pilot may from time to time direct a change in the location of crewmembers. Varvel testified that those directions might include moving a crewmember from a painting job to tightening a tow or from tightening a tow to making a speaker check before arriving at a lock. When a captain is off duty and off the vessel due to illness, vacation, etc. the pilot routinely serves as acting captain.²¹

As the vessel moves up or down the Tennessee, Ohio, or Mississippi, orders require picking up and dropping off barges.

that Church served as captain as well as pilot. Church testified that he was serving as captain when he evaluated Ward. There was no evidence disputing that testimony by Church.

²¹ As shown in the above footnote, Lavon Church served as captain while the regular captain was off duty.

Varvel testified that a vessel may include 25 loaded and 25 empty or 15 loaded and 15 empty, barges. The cargo may include coal, sand, some chemicals, some grains and some fertilizer. Barges are placed end on end, side by side, wired up with wires,²² and the boats faced up on the end of them and shoved ahead. The addition or subtraction of a barge or a number of barges may result in changing the configuration of the vessel by rearranging the barges due to such things as weight and height of the barge and the overall appearance of the mass of barges. For example a low barge may take in water over its front if placed in the front of the mass of barges and an uneven or unsquare mass may result in difficulty in steering.

David Varvel testified that the captain and pilot alternate 6-hour watches with the captain taking the front watch. The front watch extends from 6 a.m. to noon and from 6 p.m. to midnight. The captain is in overall command of the vessel and the pilot is the highest ranking person on duty during the back watch. The back watch runs from noon to 6 p.m. and from midnight to 6 a.m. During the back watch, the pilot is responsible for the safety of the entire crew and he directs the watch crew in their duties. The pilot is the supervisor of the mate and Varvel has explained that fact to mates on his vessel.

Varvel testified that pilots direct crew to take action to meet a change in weather including increment weather. He described how a pilot would handle operations when the vessel approaches a lock:

You would ring up the mate and tell him we'll be at the lock in 15 or 20 minutes, and you all get suited up, and he'd let him know what channel he wanted to work on the walkie-talkies, and tell him to be sure to get his lock ticket and any pertinent information with the lock, anything special going on with the lock, pick up the cook's mail or put this package off or anything—anything out of the ordinary, and then as he got closer to the lock, he would holler at him on the walkie-talking and tell him to go on out, and send them out early enough to do a speaker check, make sure all their lines and bumpers and stuff are in place, and then as he's coming up on the—coming up on the wall or down on the wall, whichever it is, the mate would start giving him distances from the wall and widths off the wall. Basically talk him into the lock. And then once he gets in, they close the gates, raise him or lower him, and then he—when he gets in the lock he tells, you know, the crew tie me off here, let me run down 20 feet, stop me here, stand by your line, the lock opens the gates, blows the horn. The pilot or the captain tells the crew to turn him loose. When he's been told he's all gone, he comes ahead on the engines and pushes out and they ride bumpers through the gates and talk the head of the tow through the gates, and as you depart the lock, then the crew coils up the lines and they have a procedure they go through to put everything back in place for the next lock, be it move the lines from one side to the other, what not.

Q. Does unexpected stuff ever happen during that procedure?

²² The wires are 35 feet long and 1-7/8 inches in diameter.

A. Sure.

Q. And what is the pilot's role when he starts seeing things happen that could affect the tow or the vessel?

A. Well, he has to react to try to correct it.

Q. And how would he react in doing that?

A. You would have to give me a situation to answer that.

Q. Well, I don't know. I mean, I guess the best way—assume that he made some navigational changes; is that correct?

A. If that's what needed to be done.

Q. If it involves something with the crew, would he direct the crew to do certain things?

A. He would have to.

The credited evidence proved that pilots do direct the work of the deck employees in the operation of the towboat and that may involve the exercise of independent judgment. As in *Cooper/T. Smith*, I shall consider the three-part query set forth above. I find as did the Circuit Court in *Cooper/T. Smith* that pilots hold authority in the interest of the employer. Two questions remain:

Does the employee have authority to engage in 1 of the 12 listed activities?

As shown above, I find that pilots do not have authority to engage in any of the 12 listed activities with the exception of "assign" and "responsibility direct."

During his two watch periods each day, the pilot is fully responsible for the operation of the boat and its load of barges. The captain is off watch and probably asleep. The captain remains ultimately responsible for the safety and welfare of the towboat but that does not diminish the responsibility of the pilot. As found herein, the credited record shows that the pilot may direct the work of the deck crew including the mate, as that work relates to the operation of the towboat. In that regard I credit the testimony of David Varvel that pilots may "assign" deck employees from one job to another. I have found that the record shows that the operation of the towboat is of paramount importance and that work in that regard may of necessity override other work. That evidence proves that the answer to the first query is yes. Pilots engage in 2 of the 12 listed activities.

Does the exercise of that authority require "the use of independent judgment?"

I am convinced that the credited testimony illustrated that pilots engage in a number of activities that do not require independent judgment. For example there was no proof that the pilots' communications with the office involved independent judgment. There was no showing that maintenance and dispatch of the log involved independent judgment. However, as shown throughout this decision and throughout the record, the pilot is the sole wheelhouse officer on watch during 12 hours each day. Obviously, the operation of a vessel up to a quarter mile long,²³ on the Mississippi, Ohio, and Tennessee rivers involves dynamic activity. Weather, river traffic, changing currents, floating debris, and whether the towboat itself is operating prop-

erly²⁴ are among the factors that may necessitate changes in the navigation or in the way the towboat is operated. While on watch, the pilot must make decisions regarding those operational changes. Those decisions may, in turn, necessitate the directing of work by the deck crew regarding matters such as maintaining or tightening the lines securing the barges, navigation lights maintenance and repair, docking and locking the vessel, and on occasion, the direction of work to deck employees must be made in preparation for increment weather.

I find the instant situation differs from the situation in *Spentonbush/Red Star Cos.*, 319 NLRB 988 (1995), where captains were found not to be supervisors. That case involved tugboat captains and the Board found their direction of work of crewmembers did not involve independent judgment. Instead those directions were routine in the vast majority of the cases. Here, unlike the situation in *Spentonbush*, the pilots are on duty for 6 consecutive hours twice each day for 30 days. Instead of routinely tying up to a barge it is the pilots' job to maintain 1/4-mile long vessels among other traffic in all kinds of weather including operations through locks and around dams. I have credited the testimony of David Varvel. That testimony proved that the pilots' direction of the work of the deck crew is not routine and is not that of a more experienced employee over one who is less skilled.

The evidence supported a determination that the pilots' supervisory duties remain essentially as they were in 1962 when the Board decided an earlier Ingram Barge case.²⁵

IV. SECONDARY INDICIA OF SUPERVISORY AUTHORITY

Charging Party pointed to *The Developing Labor Law Second Edition 1611, 1612* (BNA Books 1990), to show that the Board may consider secondary indicia in borderline cases of supervisory status. As shown above, Respondent held annual masters' meetings. Several witnesses including David Sullivan, Rodger Sholar, Tony Gurley, Lavon Church, Harley Hall Jr., and Steve Crowley testified about masters' meetings, which were also referred to as management or officers meetings. Rodger Sholar testified that those were annual meetings and he attended two of those meetings during the time he worked for Respondent. Respondent holds several of those meetings each year in order to include all the captains and pilots without disrupting operation of its vessels. Captains and pilots were the only onboard personnel included in those meetings. Confidential matters including financial matters were discussed. The evidence showed that those meetings were not a recent fabrication created to combat Pilot's Agree. That tends to show that Respondent has consistently treated pilots as part of management.²⁶ The earlier *Ingram Barge* NLRB decision cited at footnote 25 also supports that determination.

In view of the entire credited record I am convinced that pilots exercise authority including work assignments and the

²⁴ See for example Tr. 157–160.

²⁵ In *Masters, Mates & Pilots Local 28 (Ingram Barge Co.)*, 136 NLRB 1175 (1962), enfd. 321 F.2d 376 (D.C. Cir. 1963), the Board upheld the finding that Respondent's pilots were supervisors.

²⁶ See *Northern Virginia Steel Corp. v. NLRB*, 300 F.2d 168 (4th Cir. 1962).

²³ Alleged discriminatee Rodger Sholar testified that a "tow" may be a quarter of a mile long.

direction of work and that work oftentimes involves the exercise of independent judgment. For that reason I find that pilots are supervisors as defined in Section 2(11) of the Act.²⁷

V. THE 8(A)(1) ALLEGATIONS

A. Threatened Loss of Jobs

Steve Crowley admitted that he learned of Pilots Agree months before April 1998. Crowley learned that some of Respondent's captains and pilots were involved with Pilots Agree. He admitted that Respondent was opposed to the captains and pilots' efforts to organize a union. Crowley testified that Orrin Ingram²⁸ told Respondent's managers including captains and pilots during officers' meetings that he started building this company 50 years ago and "he could not communicate with all of us, all of the managers for the company; therefore, if it took the company of going union, the first thing he would probably do is fire all of us, not fire, but replace us, the senior executives, senior management was what he basically said, and he conveyed that if you don't like—enjoy working here, you know, you're free to leave and go work somewhere else, if you so desired, but we're not going to continue to communicate one on one, that's the way he wants to run this company."

Harley Hall Jr., a former captain,²⁹ recalled Steve Crowley telling him after the captains and pilots meeting with Orrin Ingram that Crowley was not afraid for himself because there would always be a place for him with Ingram, but he was afraid for everyone else. Crowley asked if Hall had thought what it would be like to change careers at his age and what would happen to Hall's family. Hall testified that he and Crowley are personal friends.

Former pilot Rodger Sholar attended a company meeting at Respondent's Paducah facility on March 11, 1998. Orrin Ingram spoke after lunch. Ingram talked about his father's feelings about a union. Ingram said, "I am my father's son, and that I will sell the company shut the doors and sell the company before I'll deal with the union."

Tony Gurley testified that Orrin Ingram told the employees more or less that they wouldn't have a job if they participated in Pilots Agree. He recalled that was said during a March company meeting. Ingram also said he would have no part of Pilots Agree and Respondent would not recognize Pilots Agree.

Lavon Church recalled Orrin Ingram saying his daddy always told him that if any of the Ingram companies were involved with a union, that they would shut the door, sell the company, and fire the managers. Ingram said that he was "not going that far, I'm not going to fire my managers. I've got other places for them to be, but I will shut the doors and sell the company." Ingram said that he was not going to recognize any kind of organized labor. One of the pilots asked what's going to happen to the guys that stop your boats and Ingram said they

would be fired. Ingram then stepped back and said well they won't have a job any more.

B. Expressed Futility of Bargaining

As shown above, former pilot Rodger Sholar testified about a March 11, 1998 company meeting at Respondent's Paducah facility. Orrin Ingram told the employees that, "I am my father's son, and that I will sell the company, shut the doors and sell the company before I'll deal with the union."

Tony Gurley recalled, at a March company meeting, Orrin Ingram telling the employees that he would have no part of Pilots Agree and Respondent would not recognize Pilots Agree.

Lavon Church recalled Orrin Ingram saying that he was not going to recognize any kind of organized labor.

Findings

Credibility

In view of their demeanor and the full record, I credit the testimony of Harley Hall Jr., Robert Ward, David Sullivan, Rodger Sholar, Tony Gurley, David Varvel, and Kenneth Pine except as noted herein. I credit the testimony shown above including the following: Harley Hall testified that Steve Crowley threatened him with the loss of his job; Rodger Sholar testified that Orrin Ingram threatened to shut the doors and sell the Company before he would deal with a union; Tony Gurley testified that Orrin Ingram threatened that employees would not have a job if they participated in Pilot's Agree and Ingram said that he would not recognize Pilots Agree; and Lavon Church testified that Orrin Ingram threatened to shut the door and sell the company if he was involved with a union, that anyone that stopped their boat would be fired and that he was not going to recognize any kind of organized labor.

Conclusions

But for my determination that pilots are supervisors, I would find that Respondent engaged in activity in violation of Section 8(a)(1) as alleged in the complaint. However, despite my credibility determinations I find that Respondent did not engage in activity in violation of Section 8(a)(1). In order to prove a violation of that section it is necessary to show that the alleged activity involved one or more employees. Here there was no showing that anyone other than supervisors was involved in the alleged unlawful activity.

C. The 8(a)(3) Allegations

As shown above, Steve Crowley admitted learning that some of Respondent's captains and pilots were involved with Pilots Agree. He initially admitted that Respondent was opposed to captains and pilots' efforts to organize a union.

Lavon Church testified that the Pilots Agree board of directors voted to initiate a job action against Respondent at 0001 hours on April 4, 1998. The alleged discriminatees with the exception of Rodger Sholar left their vessels while on duty on April 4, 1998.³⁰ Those pilots told Respondent of their intention

²⁷ *Cooper/T Smith, Inc. v. NLRB*, 177 F.3d 1259 (11th Cir. 1999); *Spentonbush/Red Star Cos. v. NLRB*, 106 F.3d 484 (2d Cir. 1997); cf. *Spentonbush/Red Star Cos.*, 319 NLRB 988 (1995).

²⁸ The current assistant vice president of operations Steve Crowley testified that Orrin Ingram is the owner of Respondent.

²⁹ As shown herein there is no dispute but that captains are supervisors. Therefore, Crowley's comments to Hall do not constitute an 8(a)(1) threat.

³⁰ For example David Sullivan left the vessel he was assigned to work, which was the *Alice I. Hooker*, at Ocoola, Arkansas. The vessel's destination was Cairo, Illinois. Sullivan was on watch in the wheelhouse and he stopped the vessel without asking permission of the cap-

to leave the vessels. Steve Crowley recalled two conversations with Lavon Church on that day. During the last of those calls around 5 p.m., Church confirmed to Crowley that he was stopping the vessel to honor Pilots Agree.³¹ Crowley also talked with Tony Gurley. Gurley told Crowley that he was stopping his vessel, the *O.H. Ingram*. David Sullivan told Crowley that he was stopping his vessel.³² After stopping their respective vessels, all those pilots were relieved by other personnel on that same day. Rodger Sholar was off duty at the time of the work stoppage and did not participate by stopping and leaving his vessel. Respondent wrote the alleged discriminatees that their resignations were being accepted (GC Exh. 2–5). Steve Crowley admitted that the alleged discriminatees that left their vessels told him they were supporting Pilots Agree.

1. Lavon Church

Lavon Church had a phone conversation with Steve Crowley from his vessel on the day of the strike. He told Crowley that the strike was on that that he would not be running tonight. Crowley told him to go ahead and do what he thought was right. Church stopped his boat that night around 30 minutes after midnight and sat there until daylight. Crowley phoned that morning and Church told him that he had stopped the boat. Crowley said that you know when you stopped the boat you resigned. Church rode the boat to Blytheville, Arkansas. Respondent wrote Church on April 6 and acknowledged that he had resigned (GC Exh. 2).

2. David Sullivan

Sullivan engaged in the April 4 work stoppage. As shown above Sullivan left the vessel at Ocoola, Arkansas. The vessel's destination was Cairo, Illinois. Sullivan was on watch in the wheelhouse and he stopped the vessel without asking permission of the captain. Sullivan left by a fleet boat that came out and met the *Alice I. Hooker*. Respondent wrote Sullivan on April 6 acknowledging his "resignation" (GC Exh. 4).

3. Tony Gurley

Steve Crowley asked Gurley what he would do regarding the work stoppage. Gurley told Crowley that he needed a relief and that he was getting off the boat. Gurley did not resign. He admitted on cross-examination that he told Steve Crowley that he was getting off the vessel because he feared for his own safety. He told Crowley that, "I felt it was unsafe to operate during that strike." Respondent wrote Gurley on April 6 that his action constituted job abandonment and that he was terminated (GC Exh. 3).

tain. Sullivan left by a fleet boat that came out and met the *Alice I. Hooker*.

³¹ The parties agreed that some of the captains also honored the Pilots Agree action. Charges were filed and the allegations regarding the captains were dismissed on a determination that the captains were supervisors (R. Exhs. 1 and 2).

³² On April 4, 1998, Kenny White was captain and Rod Church was pilot of the *J.M. Donnelly*; Darrell Hardy was captain and Tony Gurley was pilot of the *O.H. Ingram*; Rich Gilley was captain and David Sullivan was pilot of the *Alice I. Hooker*; and Billie Martin was captain and Rodger Sholar pilot of the *Ilene Bigelow*.

4. Rodger Sholar³³

Sholar was not on duty aboard his boat, the *Ilene Bigelow*, when the strike was called. However, he did not return at the end of his 30 days off. During a phone conversation with Steve Crowley Sholar told Crowley that he was taking the Pilots Agree stand. Rodger Sholar did not resign. Sholar testified that he wanted to discuss working conditions grievances with management. Respondent wrote Sholar on April 13 that it was accepting his resignation (GC Exh. 5).

Findings

Credibility

As shown above, I credit the testimony of David Sullivan, Rodger Sholar, and Tony Gurley except as noted herein. The record proved conclusively that the four alleged discriminatees supported Pilots Agree by engaging in a work stoppage. Even though Rodger Sholar was not on duty at the time of the work stoppage, it is undisputed that he told Respondent that he was supporting that action and would not return to work during the work stoppage. I fully credit the evidence in that regard.

Conclusions

But for my determination that pilots are supervisors I would find that Respondent engaged in activity in violation of Section 8(a)(3) as alleged in the complaint.³⁴ However, despite my credibility determinations, I find that Respondent did not engage in activity in violation of Section 8(a)(3). In this instance it is necessary to show that the alleged discriminatees were employees. As shown above, neither pilots nor captains were shown to be employees. Instead, both were shown to be supervisors. I find that Respondent did not terminate Lavon Church, David Sullivan, Tony Gurley, or Rodger Sholar in violation of Section 8(a)(1) or (3) of the Act.

CONCLUSIONS OF LAW

1. Ingram Barge Company, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Pilots Agree Association, of the Great Lakes and Rivers Maritime Region Membership Group of the International Organization of Masters, Mates and Pilots, ILA, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not engaged in conduct in violation of Section 8(a)(1) and (3) of the Act.

³³ Sholar was not on duty at the time of the strike, which is material to these proceedings. He was not aboard one of Respondent's vessels at that time.

³⁴ In that regard, I specifically reject some of Respondent's defenses. Respondent argues that the Charging Party failed to prove its labor organization status; that charging party was shown to have only minority employee support and that Charging Party's April 4 was an illegal strike for recognition. However, the evidence including R. Exhs. 3 and 4, showed that Charging Party is a labor organization and the remaining arguments are irrelevant to the issues herein. Regardless of whether Charging Party was a minority union or whether it was striking for recognition, the issues of 8(a)(1) and (3) allegations remain unchanged. Absent my findings that the pilots are supervisors, I would find that Respondent engaged in the conduct alleged in the complaint as 8(a)(1) and (3) violations.

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

ORDER

It is recommended that the complaint be dismissed.